

Joint Comment Against Adoption of ABA Model Professional Conduct Rule 8.4(g)

To: Arizona Supreme Court

Re: ABA New Model Rule 8.4 (g) Petition

We the undersigned oppose the proposed adoption of new ABA Model Rule 8.4(g) at Petition R-17-0032 because it will violate the constitutionally protected free speech, free association, and free exercise rights of Arizona lawyers. New ABA Model Rule 8.4(g) includes language making it “professional misconduct” for a lawyer to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination” based on “race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.” We raise the following 10 objections:

1. The new Rule is unconstitutional.

- A. The term “harassment” is not defined and is therefore vague.
- B. The term “discrimination” is vague and undefined as to what specific behavior constitutes discrimination.
- C. The phrase “conduct related to the practice of law” is vague and the Rule fails to delineate what conduct is related to the practice of law versus what conduct is not.
- D. The Rule is overbroad because in addition to including violations that actually prejudice the administration of justice or that affect fitness to practice, the Rule also sweeps up First Amendment attorney protected speech that might be offensive, disparaging or hurtful to others but which does not actually prejudice the administration of justice or render the attorney unfit to practice law.
- E. The Rule is an unconstitutional content-based speech restriction.
- F. The Rule violates attorney free exercise of religion and free association rights.
- G. The Rule will interfere with an attorneys’ right to express their own conscience on moral issues important to them.

2. The new Rule severs the ethical rules from any legitimate interests of the legal profession.

3. The Rule invades an attorney’s traditional right and duty to exercise professional autonomy in client and case selection.

4. The Rule conflicts with other ethical rules.

5. By forcing attorneys to represent clients who they cannot zealously represent due to their personal beliefs, the Rule creates conflicted interests that harm clients.

6. There is no need for the new Rule as ER 8.4 already addresses discrimination.

7. Federal and State law clearly define discrimination. This Rule does not.

8. The Rule weaponizes lawyer disciplinary authorities by putting lawyers at heightened risk of potentially losing their licenses for perceived misstatements at social functions, legal education conferences and bar association activities far removed from the traditional delivery of legal services.

9. There is no empirical data-driven need for the new Rule.

10. The new Rule results in suppressing politically incorrect speech while protecting politically correct speech.

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